

New material is underlined and deletions are ~~struck out~~.

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TITLE 11
DEPARTMENT OF HEALTH
CHAPTER 201
ENVIRONMENTAL COUNCIL RULES OF
PRACTICE AND PROCEDURE RELATED TO THE
ENVIRONMENTAL IMPACT STATEMENT SYSTEM

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~~Historical Note: Chapter 11-201, Administrative Rules, is based substantially on the Rules of Practice and Procedure of the Environmental Quality Commission. [Eff 6/2/75; R 12/6/85]~~¹

SUBCHAPTER 1

PURPOSE

§11-201-1 Purpose. This chapter governs procedures before the environmental council of the State of Hawaii under chapter 343, Hawaii Revised Statutes, ~~and other related acts as may now or hereafter be administered by the council.~~² ~~They shall be construed~~ to effectuate the purposes of chapter 343, Hawaii Revised Statutes, and to secure the just and speedy determination of every proceeding. [Eff 12/6/85] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 343-6)

¹ The Historical Note was deemed unnecessary and is being marked for deletion.

² Because administrative rules implement specific laws under the specific enabling provisions in those laws, the marked text is being deleted.

SUBCHAPTER 2 DEFINITIONS

§11-201-2 Definitions. The definitions As used in this chapter, unless the context otherwise specifically requires it,³ are those found in §343-2 HRS and Chapter 200-2, and:

~~"Appellant" means an applicant who appeals the non-acceptance by an agency of that person's environmental impact statement.~~

"Council or EC" means the environmental council of the State of Hawaii ~~—Its~~ whose membership shall be as provided in section 341-3, Hawaii Revised Statutes HRS.

"Director" means the director of environmental quality control.

"Office" means the office of environmental quality control.

"Party" means each person or agency specifically affected by a proceeding other than as a member of the general public. The attorney general or the attorney general's representative shall, at the request of the council, be designated as "counsel for the council" and shall be party to all proceedings governed by this chapter.

"Petitioner" means the person or agency on whose behalf a petition is made to the council for a declaratory ruling or for the adoption, amendment, or repeal of any rule of the council.

"Proceeding" means the council's elucidation and consideration of the relevant facts and applicable laws and its action thereupon with respect to a particular subject within its jurisdiction. A proceeding is initiated by a filing or submittal by of a petition, or appeals, appeal and applications by an interested person, group, or agency or by a council notice or order, and Proceedings shall include, but not be limited to the following:

- (1) ~~Proceedings involving the adoption~~ Adoption, amendment, or repeal of any rule of the council;
- (2) ~~Proceedings involving declaratory~~ Declaratory rulings; and
- (3) Appeals instituted at the request of an applicant, involving the non-acceptance of the applicant's environmental impact statement by the agency responsible for accepting that statement or any other appeal allowed by law.

"Quorum" means the majority of all the members to which the council is entitled.

"Ramseyer format" means a technique by which changes in existing rules are shown by:

³ This phrase is marked for deletion since it is unclear what it means.

- (1) Bracketing material to be deleted, or if the material being deleted is a subchapter or larger unit of organization, citing with specificity the material to be deleted; and
- (2) Underscoring material to be added, or, if the material to be added is a subchapter or larger unit of organization, citing with specificity the material to be added.⁴

"Respondent" means an agency ~~that did not accept an applicant's environmental impact statement and from~~ whose determination is subject to an appeal is filed with the council.

[Eff 12/6/85 am _____] (Auth: HRS §343-6) (Imp: HRS §343-6)

SUBCHAPTER 3

ENVIRONMENTAL COUNCIL

§11-201-3 Environmental council meetings and notices. (a) The office of the environmental council shall be located at such place and address as the council shall from time to time designate. All communications to the council shall be addressed to the chairperson of the⁵ environmental council, unless otherwise specifically directed.

~~(b) The office of the council shall be open from 7:45 a.m. to 4:30 p.m., Monday through Friday, unless otherwise provided by statute or executive order.~~

~~(e) (b) The council may meet and exercise its powers in any part of the State of Hawaii. All meetings of the council shall be open to the public, except that the council may meet in executive meetings, from which the public may be excluded, by a recorded vote of not less than two-thirds of the members present. An executive meeting shall be authorized only when, in accordance with law, it is deemed necessary for the protection of the character or reputation of any person or the protection of secret processes or methods of manufacture of any person or when the attorney general determines it is necessary for the preparation of the prosecution or defense of any action or proceeding as provided by HRS §§ 92-3.1, 92-4, 92.5, 92-6(a)(2).~~⁶ No order, ruling, appointment, contract, or decision shall be finally acted upon at an executive meeting. Meetings

⁴ *Hawaii Administrative Rules Drafting Manual*, Second Edition, by Ken Takayama and Samuel B. K. Chang, Legislative Reference Bureau, State of Hawaii, June 1984 (June 1989 reprint), p. 16.

⁵ The chairperson, elected by the members of the Environmental Council under section 341-3(c), Hawaii Revised Statutes, functions as the spokesperson of the collegial body.

⁶ These changes will automatically maintain consistency with chapter 92 without additional rules revisions if chapter 92 is revised in the future.

shall be held at times as the council deems advisable. Meetings may be scheduled by consensus of the council during the course of a meeting or during intervening days, at the call of the council chairperson or the director upon notifying the council chairperson.

(c)⁷The public, petitioners, appellants, and respondents shall receive reasonable notice of all meetings, in addition to the Office of Lieutenant Governor. Notice of meetings of the council shall:

- (1) Be sent to all requesting to be on the mailing list for this purpose and other interested parties;
- (2) Be posted in the office of the environmental council; and
- (3) Be distributed to the news media, if possible.

(d) A majority of all members to which the council is entitled shall constitute a quorum to transact business of all members to which it is entitled, to be performed in its behalf by a limited number of duly designated council members, in which case the concurrence of a majority of all the council members so designated shall be necessary to make an action valid.

(e) The council shall maintain minutes of its meetings, setting forth an accurate record of votes and actions taken at the meetings. Unless otherwise required by the governor, the minutes need not include a verbatim record of discussions at meetings. The minutes of the council shall be deemed public records, ~~provided that the minutes of any executive meeting from which the public has been excluded may remain confidential, as long as their publication would defeat the lawful purpose as stated in subsection (e), but no longer~~ subject to the provisions of Chapter 92F, HRS.⁸

(f) All decisions, orders, and other actions of the council shall be ~~authenticated~~ ^{or}⁹ signed by the council members acting in the proceeding or by the chairperson upon delegation by the council members acting in the proceeding. Official copies of decisions, orders, and other council actions may be issued under the signature of the chairperson of the council or the chairperson's delegate.

(g) All documents required to be filed with the council shall be filed ~~in~~ at the office of the council at Honolulu, Hawaii,¹⁰ within prescribed time limits ~~as prescribed~~

⁷ A new subsection has been added beginning with this sentence; notification of the Lt. Governor's office is added here.

⁸ This change in the language will automatically maintain consistency with chapter 92F without additional rules revisions if chapter 92F is revised in the future.

⁹ Because it is unclear as to how the term "authenticate" will be implemented, it is marked for deletion.

¹⁰ Changes in subsection (g) are intended to clarify the relationship between the office and the council.

~~by law, rules, or by order of the council.~~ Requests for public information, copies of official documents, or opportunity to inspect public records may be made in writing to the council office or in person at the office.

(h) Nonattendance of board member; expiration of term.

(1) Notwithstanding any law to the contrary, the term of a board member shall expire upon the failure of the member, without valid excuse, to attend three consecutive meetings duly noticed to all members of the board and where the board failed to constitute quorum necessary to transact board business. The chair or acting chair of the board shall determine if the absence of the member is excusable. The expiration of the member's term shall be effective immediately after the third consecutive unattended meeting and unexcused absence. The vacancy shall be filled in the same manner as the original appointment.

(2) This section shall not apply to ex officio members of a board. [Eff 12/6/85 am _____] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 92-4, 92-5, 92-7, 92-9, 343-3, 343-6)

§11-201-4 Delegation of administrative duties. (a) The council may delegate to any individual the power or authority vested in the council as it deems reasonable and proper for the effective administration of Chapter 343, ~~Hawaii Revised Statutes~~ HRS, except the power to adopt, amend, or repeal rules.

(b) The council by written resolution adopted by a majority of the members to which it is entitled, may appoint a hearing officer or officers, ~~who~~. Such a hearing or officers¹¹ may, but need not be, members of the council, or a disinterested attorney at law or other person or a combination of any of them to hold a hearing as provided in this chapter and take testimony upon the matters involved in the hearing and transmit to the council a record of the hearing, including a recording or transcript and a summary of the evidence taken at the hearing. After review of the testimony and evidence, a majority of the members to which the council is entitled shall render a decision on the matter.

(c) Any hearing officer may be paid a reasonable compensation as shall be determined by the council, provided that no member of the council shall be eligible to receive any compensation. [Eff 12/6/85 am _____] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 343-6)

SUBCHAPTER 4

¹¹ The sentence is complex. The proposed language clarifies the meaning of the sentence by breaking it into two simple sentences.

PUBLIC RECORDS

§11-201-5 Public records. (a) The term "public records" as used in this chapter is defined as in section 92-50, ~~Hawaii Revised Statutes~~ HRS, and ~~shall include~~ all documents sent to the council, such as maps, rules, environmental impact statements, environmental assessments, notices of determination and related documents. Public records also include written statements of policy or interpretation formulated, adopted, or used by the council, all final opinions and orders, the minutes of meetings of the council, and any other material on file in the office ~~of~~ pertaining to the council, ~~which shall include all statements and other documents prepared under the provisions of chapter 343, Hawaii Revised Statutes,~~ except materials and minutes submitted and reported in executive meetings of the council and public records identified in §92F-13, HRS.

(b) All public records in the council's custody shall be available for inspection in the office ~~of the council at Honolulu, Hawaii,~~ during established office hours unless public inspection of those records is in violation of any state or federal law.

(c) Public records printed or reproduced by the council shall be given made available to any person requesting them, ~~and paying the reasonable cost thereof.~~¹²

[(d) Requests for public information, for permission to inspect official records, or for copies of public records shall be handled expeditiously.]¹³ [Eff 12/6/85 am _____] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 343-6, 92-50)

SUBCHAPTER 5

PROCEEDINGS BEFORE COUNCIL OR HEARING OFFICER

§11-201-6 Proceedings before the council or hearing officer. (a) The council on its own motion, or upon the petition of any interested person or any agency of the federal, state, or county government, may hold such proceedings as it may deem necessary from time to time in the performance of its duties, or the formulation of its rules. Procedures to be followed by the council, unless specifically prescribed in this chapter or by chapter 91, ~~Hawaii Revised Statutes~~ HRS, shall be as in the opinion of the council will best serve the purposes of the proceeding.

(b) An individual may appear in the individual's own behalf or as an authorized representative of a partnership, corporation, trust or association, and an officer or employee of an agency of the state or a political subdivision of the state may represent the agency in any proceeding before the council.

(c) A person or agency may be represented by or with any person, counsel, or

¹² Collecting fees was deemed not feasible by OEQC staff. Those wanting copies can arrange to reproduce the file copy of materials outside the office.

¹³ A timetable has been established for this, so this section is marked for deletion.

consultant in any proceeding under this chapter, except as provided in subsection (e).

(d) When an individual acting in a representative capacity appears in person or signs a paper in practice before the council, that individual's personal appearance or signature shall constitute a representation to the council that under this chapter and the applicable statute, that individual is authorized and qualified to represent the particular person on whose behalf the individual acts. The council at any time may require any person transacting business with the council in a representative capacity to show in writing that person's authority and a qualification to act in that capacity.

(e) Bar to appearance.

- (1) No individual, whether associated with the council as a member, officer, employee, or counsel shall be permitted to appear before the council on behalf of or to represent in any manner any party in connection with any proceeding or matter that the individual has handled or passed upon while associated in any capacity with the council after June 2, 1975;
- (2) Any person or agency appearing before the council in any proceeding or matter shall not in relation thereto knowingly accept assistance from and compensate any individual who would be precluded by paragraph (1);
- (3) No individual who has been associated with the council as a member, officer, employee, or counsel thereof, shall be permitted to appear before the council in behalf of, or to represent in any manner, any person or agency in connection with any proceeding or matter that was pending before the council at the time of the individual's association with the council unless that individual shall first have obtained the written consent of the council upon a verified showing that the individual did not give personal consideration to the matter or proceeding as to which consent is sought or gain particular knowledge of the facts thereof during that individual's association with the council;
- (4) This subsection shall not apply to any individual or agency whose association with the council has been terminated for a period of one year.

(f) The council shall assign a unique docket number to each proceeding or consolidated proceeding under §11-201-8 before it or its duly designated hearings officers.¹⁴

[Eff 12/6/85 am and comp _____] (Auth: HRS §§91-2, 343-6)
(Imp: HRS §§84-18, 343-6)

¹⁴ The proposed language is intended to ensure that all documentation related to a specific proceeding before the Council remains intact and accessible to the public, as appropriate.

§11-201-7 Disqualification of council member or hearing officer. Any party to a hearing, up to five days before the proceeding, may file an affidavit that one or more of the council members or a hearing officer has a personal bias or prejudice. The council member or hearing officer against whom the affidavit is so filed may answer the affidavit or may file a disqualifying certificate with the council. If the council member or hearing officer chooses to answer the affidavit, the remaining council members shall decide by a majority of all the members to which the council is entitled whether that council member or hearing officer shall be disqualified from the proceeding. Every affidavit shall state the facts and reasons for the belief that bias or prejudice exists and shall be filed at least five days before the hearing, or good cause shall be shown for the failure to file it within the time. Any council member or hearing officer may request disqualification by filing with the chairperson a certificate that deems that person unable for any reason to preside with impartiality in the pending hearing. [Eff 12/6/85 am _____] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 343-6)

§11-201-8 Consolidations. The council, upon its own initiative or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings that involve substantially the same parties, or issues that are the same or closely related, if it finds that the consolidation or contemporaneous hearing will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. [Eff 12/6/85] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 343-6)

§11-201-9 Filing of documents. (a) All requests, appeals, pleadings, submittals, petitions, reports, maps, exceptions, briefs, memoranda, and other papers required to be filed with the council in any proceeding shall be filed at the office of the council at Honolulu, Hawaii, within the time limits prescribed by law, this chapter, or by order of the council. The date on which the papers are received by the office shall be regarded as the date of filing.

(b) All requests and appeals filed with the council shall be written in black ink, typewritten, mimeographed, or printed; shall be plainly legible; and shall be on strong, durable paper not larger than ~~8 1/2" X 14" in size~~ eight and one-half inches in length by fourteen inches in width¹⁵ except that maps, charts, tables, and other like documents may be larger, folded to the size of the papers to which they are attached.

(c) All documents shall be signed in indelible ink by the party signing or by a duly authorized agent or attorney. The signature of the person signing the document constitutes a certification that the person has read the document; that to the best of that person's knowledge, information, and belief, every statement contained therein is true, ~~and no such statement is misleading;~~ accurate, complete and that it is not interposed for

¹⁵ To clarify the meaning of the sentence, measurements are being spelled out.

delay.¹⁶

(d) Unless otherwise specifically provided by a particular rule or order of the council, an original and fifteen copies of all papers shall be filed.

(e) All documents filed by any person or agency in any proceeding shall state on the first page thereof the name, mailing address, and business telephone number, if any, of the individual or individuals who may be served with any documents filed in the proceeding. [Eff 12/6/85; am _____](Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 343-6)

§11-201-10 Amendment of documents and dismissal. If any document filed in a proceeding is not in substantial conformity with the applicable rules of the council as to contents thereof, or is otherwise insufficient, the council, on its own motion or on motion of any party, may strike the document or require its amendment. If amended, the document shall be effective as of the date of the receipt by the office¹⁷ of the amendment. [Eff 12/6/85; am _____] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 343-6)

§11-201-11 Retention of documents. All documents filed with or presented to the council shall be retained in the files of the council. ~~The council may permit the withdrawal of original documents upon submission of properly authenticated copies to replace the documents.~~¹⁸ [Eff 12/6/85 am _____] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 343-6)

§11-201-12 Service of process. (a) The council shall cause to be served all orders, notices, and other papers issued by it, together with any other papers that it is required by law to serve. All other papers shall be served by the parties filing them.

(b) All papers served by either the council or any party shall be served upon all parties or their counsel. Any counsel entering an appearance subsequent to the proceeding shall notify all other counsel then of record and all parties not represented by counsel of the fact.

¹⁶ The word "misleading" is a term open to a wide range of interpretations. The proposed addition is an attempt to present a more neutral descriptor of the statements contained in a document. The language also reflects the proposed signatory provisions in §11-200-20(d), Committee Working Draft 2.

¹⁷ This addition is proposed to clarify that both the "council" and the "office" are collocated in the same physical plant, with office staff providing support for the council.

¹⁸ Allowing original materials to be withdrawn and replaced undermines the integrity of the document and requires that replaced documents be examined for alteration. Such examination would be a wasteful use of staff time. Hence, the language is marked for deletion.

(c) The final order, and any other paper required to be served by the council upon a party, shall be served upon the party and a copy shall be furnished to counsel of record.

(d) Service of papers shall be made personally or, unless otherwise provided by law, by first-class mail.

(e) Service upon parties, other than the council, shall be regarded as complete by mail upon deposit in the United States mail, properly stamped and properly addressed to the parties involved. [Eff 12/6/85] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 343-6)

§11-201-13 Council decision. All final orders, opinions, or rulings entered by the council in the proceeding and rules adopted by the council shall be served upon the parties participating in the proceeding by regular mail or personal delivery by the council and a summary of which shall be released for general publication published in the periodic bulletin in accordance with §11-200-3.¹⁹ ~~Copies of the published material~~ All final orders, opinions, rulings or rules adopted by the council²⁰ shall be available for public inspection in the office of the council²¹ or may be obtained upon request ~~and upon payment of reasonable charges.~~²² [Eff 12/6/85 am _____] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 343-6)

§11-201-14 Computation of time. In computing any period of time prescribed or allowed by this chapter, order of the council, or by any applicable statute, the day of the act, event, or default after which the designated period of time is to run, shall not be included. The last day of the period so computed shall be included unless it is a Sunday or legal holiday in the State of Hawaii. [Eff 12/6/85;] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 343-6)

¹⁹ Because the use of the term "general publication" implies that someone will publish the final order, opinion, ruling or rules, the proposed language avoids ambiguity by requiring that a summary of the decision on the final order, opinion, ruling or rules be published in the periodic bulletin.

²⁰ See above. The term "published material" is deleted to prevent confusion as to who is the agent publishing such material. The office will publish only the summary of the order, opinion, ruling, or rule adopted by the council in the periodic bulletin in accordance with the proposed provisions of §11-200-3.

²¹ This clarifies that both the "council" and the "office" are collocated in the same physical plant, with office staff providing support for the council.

²² Collecting fees was deemed not feasible by OEQC staff. Those wanting copies can arrange to reproduce the file copy of materials outside the office.

§11-201-15 Continuance or extensions of time. Whenever a person or agency has a right or is required to take action within a period prescribed or allowed by this chapter, the council, upon motion and the concurrence of a majority of all the members to which the council is entitled, may permit the act to be done after expiration of the specified period if the delinquency is clearly shown to have been the result of excusable neglect, ~~and~~ provided the council will have enough time to comply with applicable statutory time limits. [Eff 12/6/85] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 343-6)

SUBCHAPTER 6 RULEMAKING

§11-201-16 Initiation of rulemaking proceedings. (a) The council, at any time on its own motion, may initiate proceedings for the adoption, amendment, or repeal of any rule of the council. Procedures to be followed in rulemaking proceedings shall be set forth in this chapter and applicable law.

(b) Any interested person or agency may petition the council for the adoption, amendment, or repeal of any rule of the council. Petitions for rulemaking filed with the council shall become ~~matters of~~ public record.

(c) Petitions for rulemaking shall conform to section 11-201-9 and shall contain:

- (1) The name, address, and telephone number of each petitioner;
- (2) The signature of each petitioner;
- (3) A draft ~~or the substance of~~ the proposed adoption, ~~or amendment, or a designation of the provisions the repeal of which is desired in the Ramseyer format;~~²³
- (4) A statement of the petitioner's interest in the subject matter; and
- (5) A statement of the reasons in support of the proposed adoption, amendment, or repeal.

(d) The council, within ~~thirty~~ ninety²⁴ days after the filing of a petition for rulemaking, shall either deny the petition or initiate public rulemaking proceedings in accordance with chapter 91, ~~Hawaii Revised Statutes~~ HRS.

(e) Any petition that fails in any material respect to comply with the

²³ The revisions are proposed since petitions for the adoption, amendment or repeal of rules need to clearly articulate what specific changes are being proposed. See section 91-6, Hawaii Revised Statutes. Including the word "substance" would be burdensome on the council since it would need to define such a vague term in any public notice under chapter 91, Hawaii Revised Statutes. See *also*, the proposed definition of "Ramseyer format" in §11-201-2.

²⁴ This is to allow the council sufficient time for this procedure .

requirements of this section or that fails to disclose sufficient reasons to justify the institution of public rulemaking proceedings shall not be considered by the council. The council shall notify the petitioner in writing of the denial, stating the reasons therefore²⁵. Denial of a petition shall not operate to prevent the council from acting, on its own motion, on any matter disclosed in the petition. The petitioner may seek a judicial review of the denial through the circuit court pursuant to chapter 91, ~~Hawaii Revised Statutes HRS.~~²⁶

(f) If the council determines that the petition is in order and that it discloses sufficient reasons in support of the proposed rulemaking to justify the institution of rulemaking proceedings, the procedures to be followed shall be as set forth in this subchapter ~~sections 11-201-17 to 11-201-19~~²⁷ and applicable law. [Eff 12/6/85 am _____] (Auth: HRS §§91-2, 91-6, 343-6) (Imp: HRS §§91-2, 91-6, 343-6)

§11-201-17 Notice of public hearing proposed rulemaking. (a) When, pursuant to a petition ~~therefor~~²⁸ or upon its own motion, the council proposes to adopt, amend, or repeal a rule, a notice of proposed rulemaking shall be published as provided for in HAR 11-201-3 (c) ~~at least once in a newspaper of general circulation in the State and at least once in a newspaper which is printed and issued at least twice a week in the county affected by the proposed action. The notice shall also be mailed to all persons or agencies who have made timely written requests for advance notice of the council's rulemaking proceedings. All notices shall be published at least twenty days prior to the date set for public hearing.~~

(b) A notice of the proposed adoption, amendment, or repeal of a rule shall ~~include~~ describe the substance of the proposed rulemaking.²⁹

- ~~(1) — A statement of the date, time, and place where the public hearing will be held;~~
- ~~(2) — Reference to the authority under which the adoption, amendment, or repeal of a rule is proposed; and~~
- ~~(3) — A statement of the substance of the proposed rulemaking.~~

²⁵ This is an updated spelling.

²⁶ The marked text is proposed for deletion. See section 91-7 of the Hawaii Revised Statutes; also, sections 91-14 and 91-15 of the Hawaii Revised Statutes.

²⁷ This makes more general reference to the subchapter rather than specific sections, which allows future changes to section numbers without having to amend the reference.

²⁸ This word is not required.

²⁹ This subchapter is in conformance with the provisions of HRS chapter 92.

[Eff 12/6/85; am _____] Auth: HRS §§91-2, 91-7, 91-14, 91-15,³⁰ 343-6)
(Imp: HRS §§91-2, 91-3, 91-7, 91-14, 91-15,³¹ 92-41, 343-6)

~~§11-201-18 Conduct of hearing. (a) The public hearing for the adoption, amendment, or repeal of rules shall be heard before the council and presided over by the chairperson of the council, or, in the chairperson's absence by another member designated by the council, as hearing officer. The hearing shall be conducted in a manner as to afford to interested persons and agencies a reasonable opportunity to offer testimony with respect to the matters specified in the notice of hearing and so as to obtain a clear and orderly record. The presiding officer shall have authority to administer oaths or affirmations and to take all other actions necessary to the orderly conduct of the hearing.~~

~~(b) Each hearing shall be held at the time and place set stated in the notice of hearing but at the time and place may be continued by the presiding officer from day to day or adjourned to a later date or to a different place without notice other than the announcement thereof at the hearing.~~

~~(c) At the commencement of the hearing, the presiding officer shall read the notice of hearing and shall then outline briefly the procedure to be followed. Testimony shall then be received with respect to the matters specified in the notice of hearing in the order as the presiding officer shall prescribe.~~

~~(d) Each witness, before proceeding to testify, shall state the witness' name, address, and whom the witness represents at the hearing, and shall give the information respecting the appearance of the witness as the presiding officer may request. The presiding officer shall confine the testimony to the matters for which the hearing has been called but shall not apply the technical rules of evidence. Every witness shall be subject to questioning by the members of the council or by any other representative of the council. Cross-examination by persons or agencies shall be permitted only at the discretion of the presiding officer.~~

~~(e) All interested persons or agencies shall be afforded an opportunity to submit data, views, or arguments orally or in writing that are relevant to the matters specified in the notice of hearing. The period for filing written comments or recommendations may be extended beyond the hearing date by the presiding officer for good cause. An original and fifteen copies of written comments, recommendations, or replies shall be submitted.~~

~~(f) Unless otherwise specifically ordered by the council, testimony given at the~~

³⁰ These new citations of authority are being added since they also provide the legal basis for section 11-201-17(b).

³¹ See previous note **(double-check this w/denise)**

~~public hearing shall not be reported verbatim. All supporting written statements, maps, charts, tabulations, or similar data offered in evidence at the hearing, and which are deemed by the presiding officer to be authentic and relevant, shall be received in evidence and made a part of the record. Unless the presiding officer finds that the furnishing of copies is impracticable, sixteen copies of the exhibits shall be submitted. [Eff 12/6/85 am _____] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 91-3, 343-6)~~³²

§11-201-19 Council action. The council shall consider all relevant comments and materials of record before taking final action in a rulemaking proceeding prior to commencement of the public hearing process pursuant to HRS 91.³³ ~~Final action should be taken within twenty-sixty working days after:~~

- ~~(1) — The final public hearing; or~~
- ~~(2) — The expiration of any extension period for submission of written comments or recommendations. [Eff 12/6/85 am _____] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 91-3, 343-6)~~

§11-201-20 Emergency rulemaking. The council may adopt emergency rules pursuant to section 91-3, ~~Hawaii Revised Statutes~~ HRS. [Eff 12/6/85 am _____] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-2, 91-3, 343-6)

SUBCHAPTER 7 DECLARATORY RULINGS

~~§11-201-21 Petitions for declaratory rulings. (a) On petition of an interested person or agency, the council may issue a declaratory order as to the applicability of any statutory provision or any rule or order of the council and may also make determinations under chapter 343, Hawaii Revised Statutes. The petition shall conform to the requirements of section 11-201-9 and shall contain:~~

- ~~(1) — The name, address, and telephone number of each petitioner;~~
- ~~(2) — The signature of each petitioner;~~
- ~~(3) — A designation of the specific provision, rule, or order in question, together with a statement of the controversy or uncertainty~~

³² The section is being deleted because the requirement for a public hearing before the Environmental Council duplicates the requirement as provided for in HRS 92.

³³ This proposed addition implements section 91-3(c), Hawaii Revised Statutes which explicitly requires that all rules be approved by the governor.

involved;

- (4) — A statement of the petitioner's interest in the subject matter, including the reasons for submission of the petition;
- (5) — A statement of the petitioner's position or contention; and
- (6) — A memorandum of authorities, containing a full discussion of reasons and legal authorities, in support of the petitioner's position or contention.

——— (b) The council shall inform the public regarding petitions for declaratory rulings in the office's periodic bulletin. Within thirty days after the submission of a petition for declaratory ruling, the council shall either deny the petition in writing, stating the reasons for the denial, or issue a declaratory order on the matters contained in the petition, or set the matter for hearing, as provided in section 11-201-23, provided that if the matter is set for hearing, the council shall render its findings and decision within fifteen days after the close of the hearing. Any determination by the council regarding the petition for declaratory ruling shall be published in the office's periodic bulletin.

——— (c) The council, without notice or hearing, may dismiss a petition for declaratory ruling that fails in material respect to comply with the requirements of this section. [Eff 12/6/85; am _____] (Auth: HRS §§91-2, 91-8, 343-6) (Imp: HRS §§91-2, 91-8, 343-6)

——— §11-201-22 Refusal to issue a declaratory order. The council, for good cause, may refuse to issue a declaratory order with by giving specific reasons for the determination. Without limiting the generality of the foregoing, the council may so refuse where:

- (1) — The question is speculative or purely hypothetical and does not involve existing facts, or facts that can be expected to exist in the near future;
- (2) — The petitioner's interest is not of the type that would give the petitioner standing to maintain an action if judicial relief is sought;
- (3) — The issuance of the declaratory order may affect the interests of the council in a litigation that is pending or may reasonably be expected to arise; and
- (4) — The matter is not within the jurisdiction of the council. [Eff 12/6/85 am _____] (Auth: HRS §§91-2, 91-8, 343-6) (Imp: HRS §§91-2, 91-8, 343-6) —————

——— §11-201-23 Request for hearing. Although in the usual course of disposition of a petition for a declaratory ruling no formal hearing shall be granted to the petitioner or to a party in interest, the council may order the proceeding set down for hearing. Any petitioner or party in interest who desires a hearing on a petition for a declaratory ruling shall set forth in detail in the request the reasons, together with supporting affidavits or

~~other written evidence and briefs or memoranda of legal authorities, why the matters alleged in the petition will not permit the fair and expeditious disposition of the petition. To the extent that the request for a hearing is dependent upon factual assertion, the request shall be accompanied by affidavits establishing these facts. In the event a hearing is ordered by the council, chapter 91, Hawaii Revised Statutes ~~HRS~~, shall govern the proceedings. [Eff 12/6/85; am _____] (Auth: HRS §§91-2, 91-8, 343-6) (Imp: HRS §§91-2, 91-8, 343-6)~~

~~_____ §11-201-24 Applicability of order. An order disposing of a petition shall apply only to the factual situation described in the petition or set forth in the order. [Eff 12/6/85] (Auth: HRS §§91-2, 91-8, 343-6) (Imp: HRS §§91-2, 91-8, 343-6)~~

~~_____ §11-201-25 Declaratory ruling order on council's own motion. Notwithstanding this chapter, the council, on its own motion or upon request but without notice or hearing, may issue a declaratory order to terminate a controversy or to remove uncertainty. [Eff 12/6/85; am _____] (Auth: HRS §§91-2, 91-8, 343-6) (Imp: HRS §§91-2, 91-8, 343-6)~~³⁴

SUBCHAPTER 8

APPEALS OF NON-ACCEPTANCE OF ENVIRONMENTAL IMPACT STATEMENTS³⁵

§11-201-26 Filing of appeal. (a) An appellant, within sixty calendar days after non-acceptance of the environmental impact statement by an agency, may file an appeal with the council ~~against the agency~~, charging that the agency has improperly determined that the statement is not acceptable. A copy of the appeal with accompanying documents shall also be sent to the respondent.

(b) A document filed by an appellant initiating an appeal to the council shall be accompanied by a nonrefundable fee of \$50 to partially cover publication and administrative costs.

(c) The appeal shall conform to the requirements of section 11-201-9. The appeal of an agency's non-acceptance of an environmental impact statement³⁶ shall contain:

- (1) A list of the persons who are proposing the action;

³⁴ This section is proposed for deletion since, per the AG's opinion, there is no legal basis for it.

³⁵ The expanded title is more accurate.

³⁶ This contents list is only for appeals to EIS determinations.

- (2) A copy of the environmental impact statement submitted by the appellant to the agency and a copy of the subsequent revised statement, if any;
- (3) A copy of the comments and other communications received during the review of the statement that are pertinent to the issues involved in the complaint;
- (4) A copy of the findings and reasons submitted by the agency to the appellant in support of its determination of non-acceptance; and
- (5) A concise memorandum setting forth the facts and law in support of the appeal. [Eff 12/6/85; am _____] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§343-5, 343-6)

§11-201-27 Filing of response to appeal. At least five working days before the date set for hearing on an appeal, the respondent shall file with the council a concise memorandum setting forth the facts and law in support of its determination to not accept the appellant's environmental impact statement. [Eff 12/6/85] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§343-5, 343-6)

§11-201-28 Appeal hearings; generally. (a) An appeal shall be conducted as a contested case under chapter 91, ~~Hawaii Revised Statutes~~ HRS. The council, upon receipt of an appeal, shall order the matter set for hearing. A notice of hearing shall be served at least fifteen days before the hearing upon the appellant and the respondent agency.

(b) Appeals shall be heard before the council or a hearing officer duly appointed by the council. A hearing officer shall be appointed at least fifteen days prior to the hearing and notice shall be given to all parties at that time.

(c) When a proceeding is conducted before the council itself, the proceeding shall be presided over by the chairperson of the council or, in the chairperson's absence, by another member designated by the council.

(d) The presiding officer at a proceeding shall have authority to:

- (1) Control the course of the hearing;
- (2) Hold conferences open to the public on which they have had notice, for the settlement or simplification of issues;
- (3) Administer oaths and affirmations;
- (4) Grant application for and issue subpoenas;
- (5) Take or cause deposition to be taken;
- (6) Rule upon offers of proof and receive relevant evidence;
- (7) Limit lines of questioning or testimony that are irrelevant, immaterial, or repetitious;
- (8) Rule upon all objections, procedural requests, and motions that

- do not involve final determination of proceedings;
- (9) Dispose of any other matter that normally and properly arises in the course of the proceeding; and
- (10) Take all other actions authorized by chapter 343, ~~Hawaii Revised Statutes~~ HRS, rules, or by any other statute, that are deemed necessary to the orderly and just conduct of the hearing.

(e) The hearing officer shall have the powers as are accorded to the presiding officer in the hearing of an appeal as provided in subsection (d). In the event that the hearing officer is absent or unable to act, the powers and duties to be performed under this chapter in connection with the proceeding, without abatement of the proceeding unless otherwise ordered by the council, may be assigned to another hearing officer duly appointed by the chairperson.

(f) No hearing officer or council member shall be assigned to serve in any proceeding who:

- (1) Has any pecuniary interest in any matter or business involved in the proceeding;
- (2) Is related within the first degree by blood or marriage to any party to the proceeding; or
- (3) Has participated in an investigation preceding the institution of the proceeding or in a determination that it should be instituted or in the development of the evidence to be introduced therein.

However, if a council member has participated in making a recommendation to an agency under section 343-5(c), ~~Hawaii Revised Statutes~~ HRS, this shall not disqualify that council member.

(g) Each hearing shall be held on the island where the dispute has arisen unless an alternative site is agreed to by all parties.³⁷ Hearings shall be held, on the first day, at the time and place set forth in the notice of hearing, but may at that time and place be continued from day to day or adjourned to a later day or to a different place without notice other than the announcement thereof by the presiding officer or hearing officer at the hearing.

(h) Hearings shall be open to the public.

(i) The record of the hearing shall be compiled in conformance with section 91-9(e), ~~Hawaii Revised Statutes~~ HRS. The council shall make provisions for stenographic record of the testimony, but it shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review. Any person desiring a copy of the record of a hearing or any part thereof shall be entitled to the same upon written application to the council and upon payment of reasonable costs thereof. [Eff 12/6/85 am _____] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-9, 91-

³⁷ It might be better to hold a hearing on O`ahu even if the dispute is on a Big Island EIS.

9.5, 343-5, 343-6)

§11-201-29 Appeal hearings; witnesses. (a) Subpoenas requiring the attendance of witnesses or the production of documentary evidence from any place within the State of Hawaii at any designated place of hearing may be issued by the presiding officer or any designated member of the council or by the hearing officer. Application for subpoenas shall be made in writing to the council or hearing officer. The application shall specify the particular documents or data desired and shall show their relevancy to the issues involved. Application shall be made at least three days prior to the hearing. If application is made at a later time, the council may, in its discretion, issue subpoenas or continue the hearing or any part thereof. Enforcement of obedience to subpoenas issued by the presiding officer or any designated member of the council or by the hearing officer and served pursuant to this chapter shall be effected by written application of any member of the council to any circuit judge.

(b) Witnesses summoned shall be paid the same fees and mileage as are paid witnesses in circuit courts of the State of Hawaii and those fees and mileage shall be paid by the party at whose instance the witnesses appear. Fees for the depositions shall be paid by the party at whose request the depositions are taken.

(c) Witnesses shall be placed under oath or affirmation prior to testifying. [Eff 12/6/85] (Auth: HRS §§91-2, 343-6) (Imp: §§91-9, 343-5, 343-6)

§11-201-30 Appeal hearings; procedures. (a) At the commencement of the hearing, the presiding officer or hearing officer shall read the notice of hearing and shall then outline briefly the procedure to be followed. This procedure, unless specifically prescribed in this chapter or by chapter 91, ~~Hawaii Revised Statutes~~ HRS, shall be such as in the opinion of the presiding officer or hearing officer shall best serve the purposes of the hearing without prejudice to any party.

(b) All parties shall be given reasonable opportunity to offer testimony with respect to the matters relevant to the proceeding. Witnesses, before proceeding to testify, shall state their name, title, address, whom they represent at the hearing, and shall give the information respecting their appearance relevant to the proceeding as the presiding officer or hearing officer may request. The presiding officer or hearing officer shall confine the testimony to the matters for which the hearing has been called but need not apply the technical rules of evidence except as required by law. Each witness shall be subject to questioning by members of the council and by any representative of the council. Each witness shall also be subject to cross-examination by the adverse party. Each party shall have the right to submit rebuttal evidence and rebuttal arguments.

(c) The council or hearing officer shall take notice of judicially recognizable facts and may take notice of generally recognizable technical or scientific facts within the council's or hearing officer's specialized knowledge when parties are given notice

either before or during the hearing of the material so noticed and are afforded the opportunity to contest the facts so noticed.

(d) At the hearing, the presiding officer or hearing officer may require the production of further evidence upon any issue.

(e) After all the evidence has been presented, the council or hearing officer shall give the parties opportunity to summarize. Within a reasonable time after the final arguments have been completed and all requested memoranda submitted, the council or hearing officer shall bring the matter to a close.

(f) The council or hearing officer shall permit parties to file proposed findings and conclusions, together with the reasons therefor³⁸ at the close of the hearings or within the time as is extended at the discretion of the council or hearing officer. The proposal shall be in writing and shall contain references to the record and to the authorities relied upon. Copies thereof shall be furnished to all parties.

(g) The council, as soon as practicable and unless otherwise stipulated by the parties, not later than thirty days after receipt of the appeal, shall notify the appellant of the decision and order. This decision and order shall include separate findings of facts and conclusions of law if the decision is adverse to the appellant. The council shall incorporate in the decision a ruling upon each proposed finding so presented. Parties to the proceeding shall be notified by delivering or mailing a certified copy of the decision and order and any accompanying findings and conclusions to each party or to the party's attorney of record. [Eff 12/6/85 am _____] (Auth: HRS §§91-2, 343-6) (Imp: HRS §§91-10, 91-11, 91-12, 343-5, 343-6)

~~———— The Environmental Council authorized the repeal of the Environmental Quality Commission Rules of Practice and Procedure and the adoption of Chapter 11-201, Administrative Rules, on April 17, 1985 following public hearings held on November 7, 8, 14, 15, and 19, 1984 after public notice was published in the Honolulu Advertiser, the Garden Island, the Maui News, and the Hawaii Tribune Herald, and the West Hawaii Today on October 17, 1984.~~

~~———— Chapter 11-201, Administrative Rules and the repeal of the Environmental Quality Commission Rules of Practice and Procedure shall take effect ten days after filing with the Office of the Lieutenant Governor.~~

~~JAMES W. MORROW
Chairman
Environmental Council~~

³⁸ This is an updated spelling.

~~LESLIE S. MATSUBARA~~

~~Director~~

~~Department of Health~~

~~APPROVED:~~

~~GEORGE R. ARIYOSHI~~

~~GOVERNOR~~

~~STATE OF HAWAII~~

~~Dated: November 25, 1985~~

~~APPROVED AS TO FORM:~~

~~Deputy Attorney General~~

~~Filed~~

~~Effective Date~~

Amendments and compilation of Chapter 11-201, Hawai`i Administrative Rules
were adopted on _____, following public hearings held on
_____ after public notice was published in the Honolulu Advertiser,
the Honolulu Star Bulletin, the Garden Island, the Maui News, the Hawai`i Tribune
Herald, West Hawai`i Today, the Moloka`i Dispatch on _____.

The amendment and compilation of Chapter 11-201, Hawai`i Administrative
Rules shall take effect ten days after filing with the Office of the Lieutenant Governor.

DENISE ANTOLINI

Chairperson

Environmental Council

CHIYOME L. FUKINO, M.D.

Director of Health

APPROVED/DISAPPROVED

APPROVED AS TO FORM:

LINDA LINGLE
Governor, State of Hawai`i

HEIDI RIAN
Deputy Attorney General

Filed

Effective Date